No. 21,802

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

MARICOPA TALLOW WORKS, INC., W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, AND ANAHEIM CITRUS PRODUCTS CO., INC., APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

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INDEX

TABLE OF AUTHORITIES

Cases:

Cases: Page

Statutes and Rules:

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v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE UNITED STATES OF AMERICA

STATEMENT

Appellants' statement of the case is substantially correct, except as follows:

At page 2 of their brief appellants state that the subpoena in question directed "that certain designated corporate records be produced for Grand Jury inspection purposes." On the next page, they assert that the subpoena demanded "numerous personal papers which were not records of the corporation." The first of these two statements is correct —i.e. no personal papers were demanded and the subpoena was directed solely to the corporation, Maricopa Tallow Works, Inc. (hereafter referred to as "Maricopa"). In addition, the district court's order of December 6, 1966 excluded from the scope of the subpoena all "personal papers, records, and documents" of the individual appellants, as well as

"documents held by them in a personal capacity." (R. 35).

In its order of December 6, 1966, the district court had also included the following restrictive provision:

> "3. With respect to the materials furnished to the Grand Jury by reason of the subpoena heretofore issued, it is ordered that these materials may only be used for purposes of investigating possible criminal activity on the part of Maricopa' Tallow Works, Inc. and may not be used for the purpose of investigating any possible criminal activity on the part of any of the above named individuals [appellants]." (R. 35-36).

But this paragraph was stricken by the court's amended order of February 8, 1967 on the government's motion for modification. The Government's memorandum supporting its motion for modification cited the Supreme Court cases discussed, infra, as well as Wild v. Brewer, 329 F. 2d 924 (C.A. 9), certiorari denied 379 U.S. 914. Contrary to appellants' assertion (Brief, p. 5), the appellee-United States never acknowledged or conceded that Wild v. Brewer is not controlling of the facts in this case. During the argument on appellant's motion to quash the subpoena, government counsel simply recognized that the fact of Wild v. Brewer did not involve a restrictive provision like that quoted above.[1/]

1/ MR. FLYNN, Counsel for Appellant: Yes, but they have not granted immunity under the cases until they begin to inquire of the individual about the contents of the books and records, and then the immunity attaches. And so this again is how they

(Continued next page.)

QUESTIONS PRESENTED

1. Whether the district court's order refusing to quash or modify the grand jury subpoena duces tecum issued to Maricopa Tallow Works Inc., is appealable as a final decision under 28 U.S.C. 1291.

2. Whether corporate documents subpoenaed by a grand jury can be immunized from disclosure or limited in use by the grand jury on the ground that they may incriminate individuals connected with the corporation, or the corporation itself.

SUMMARY OF ARGUMENT

The Supreme Court of the United States has unequivocally defined the law relevant to both of the questions in this case, and in each instance has ruled that appellants' position

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1/ Footnote continued from preceding page.
avoid this question of immunity from self-incrimination and yet get an indictment against the individual. That's why we are urging upon the Court limitation of the use of the books and records themselves.

Mr. Rosenstein: Your Honor, may I respond very briefly to that?

The Government strongly resists an order to that effect, of course, and we base that resistance on two Supreme Court cases which I read, U.S. vs. White and Rogers vs. United States, which squarely hold that if these are corporate records and they incidentally incriminate the keepers, the custodians, they still must be produced. That is the state of the law at present.

In addition, the Wild vs. Brewer case specifically holds that-- on page 927, and that's a 9th Circuit case. And on that basis the Government contends that such an order be erroneous under the state of the law today.

THE COURT: Wait a minute. Wait a minute.
There wasn't any such order in any one of those cases, was there?

Mr. Rosenstein: No.

THE COURT: We don't know it, do we?

Mr. Rosenstein: Well, all right. [Transcript of Hearing on Motion to Quash Subpoena Duces Tecum, December 6, 1966, pp. 20-22.]

is without merit. Cobbledick v. United States, 309 U.S. 323, held that an order denying a motion to quash a grand jury subpoena is not a final order and therefore not appealable. The exception to this rule where the subpoena demands material subject to a claim that it is privileged as the work product of an attorney, Perlman v. United States, 247 U.S. 7, Continental Oil Co. v. United States, 330 F.2d 347, is not applicable to the facts of this case.

That the Fifth Amendment privilege against self-incrimination is unavailable when documents are subpoenaed from a corporation is well established by the Supreme Court. See Hale v. Henkel, 201 U.S. 43, and Wilson v. United States, 221 U.S. 361. Not only is the corporation without a privilege against self-incrimination, but the law is clear that shareholders, officers, directors, and employees of a corporation cannot claim the privilege — which applies only to their personal papers — as to corporate documents.

ARGUMENT

1. THE DISTRICT COURT'S ORDER REFUSING TO QUASH OR MODIFY THE GRAND JURY SUBPOENA DUCES TECUM ISSUED TO MARICOPA TALLOW WORKS, INC., IS NOT APPEALABLE BECAUSE NOT A FINAL DECISION UNDER 28 U.S.C. 1291.

On May 19, 1967, the United States moved this court to dismiss this appeal, or in the alternative for summary affirmance.[2]

In summary, the motion to dismiss the appeal is based upon Cobbledick v. United States, 309 U. S. 323 (1940). In that case the Supreme Court was faced with the question of "whether an order denying a motion to quash a subpoena duces tecum directing a witness to appear before a grand jury is included within those 'final decisions' in the district court which alone the circuit courts of appeal are authorized to review . . ." (309 U.S. at 324). The court held that the order was not an appealable "final decision". It emphasized policy against piecemeal appellate review and against any "undue interruption of the inquiry instituted by a grand jury" (309 U.S. at 327). The Court noted that its ruling did not deprive the person opposing the subpoena of appellate review because they could challenge or appeal final orders imposing sanctions for disobeying the subpoena.

Appellants responded to the government's motion to dismiss

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2 / The alternative motion is based upon this Court's decision in Wild v. Brewer, 329 F. 2d 924, certiorari denied 379 U.S. 914, which completely disposes of appellants' arguments herein. Argument on that question is contained infra.

by citing this Court's decision in Continental Oil Co. v. United States, 330 F.2d 347, as expressly sustaining appealability. The government filed a reply memorandum which illustrated that the Continental Oil case involved an exception to the Cobbledick rule not here relevant — the attorney's work product privilege. A line of cases discussed by this Court in Continental Oil (Perlman v. United States,247 U.S. 7; Schwimmer v. United States, 232 F. 2d 855 (8 Cir.)), permits appeal because of the strong public policy against forcing an attorney on behalf of his client to run the risk of a contempt citation. See Hickman v. Taylor, 329 U.S. 495, 512. (Hickman was also cited in Continental.)

This is not a case in which documents are demanded of a lawyer, nor one where the attorney — client privilege or work product privilege is claimed. Continental Oil is therefore inapplicable and Cobbledick requires dismissal of the appeal.

2. CORPORATE DOCUMENTS SUBPOENAED BY A GRAND JURY CANNOT BE IMMUNIZED FROM DISCLOSURE OR LIMITED IN USE BY THE GRAND JURY ON THE GROUND THAT THEY MAY INCRIMINATE INDIVIDUALS CONNECTED WITH THE CORPORATION, OR THE CORPORATION ITSELF.

Anaheim Citrus Products Co., Inc. and the individual appellants as stockholders and officers of Maricopa argue that the corporate documents subpoenaed from Maricopa may tend to incriminate them. In addition Maricopa, a corporation, contends

that it has a privilege against self-incrimination. In reliance upon these arguments of constitutional privilege, appellants urge that the district court erred in refusing to quash the subpoena and in modifying its order of December 6, 1966 by striking from it the provision (¶3) precluding the grand jury from using documents produced under the subpoena for investigating criminal activity on the part of appellants other than Maricopa. In the alternative, they argue that the antitrust immunity statute, 15 U.S.C. 32-33, grants them immunity from prosecution. We show below that neither of these contentions have merit.

Appellants acknowledge that the current law, as enunciated by Supreme Court decisions, limits the privilege against self-incrimination to natural persons (Appellants' brief, p. 14) --i.e., a corporation has no such privilege, Hale v. Henkel, 201 U.S. 43, and production of documents belonging to a corporation may not be resisted because they may tend to incriminate anyone, Wilson v. United States, 221 U.S. 361. Despite the clarity of these holdings, appellants urge that this court overrule them in the light of numerous recent holdings by the Supreme Court that the privilege against self-incrimination is fundamental to a free and libertarian society. 3 / None of these decisions question

3 / E.g. Malloy v. Hogan, 378 U.S. 1; Ullman v. United States, 350 U.S. 422; Spevack v. Klein, 385 U.S. 511; Garrity v. New Jersey, 385 U.S. 493. None of these cases involved corporate documents. Each involved a natural person claiming the privilege on his own behalf.

the validity of Hale v. Henkel and Wilson and cases following them, and no decision of the Supreme Court furnishes any support for the contentions urged by appellants. The Supreme Court has never questioned the principle that self-incrimination is a privilege personal to individuals, which cannot be invoked to bar the evidence of another, and which cannot be claimed at all by corporations.

Only three years ago, this Court applied these principles. In Wild v. Brewer, 329 F. 2d 924 (C.A. 9) certiorari denied 379 U. S. 914, the sole stockholder of a corporation resisted the production of his corporation's documents demanded by the government because they might tend to incriminate him. The identity of interest between the corporation and the person claiming the privilege was almost total.[4/] Yet this Court correctly held that the stockholder's claim of self-incrimination could not be invoked to prevent the production of a corporation's documents. Appellants urge that United States v. White, 322 U. S. 694, a Supreme Court decision post-dating Hale v. Henkel and Wilson, questions the validity of those cases and suggests a new standard whereby small, closely held corporations are within the ambit of the self-incrimination privilege, or,

4 / It should be noted that this is not so in the instant case. Among Maricopa's several shareholders is another corporation with an unknown number of shareholders.

rather, that their owners and officers may claim the privilege as to corporate documents. This is simply not so. White involved a grand jury investigative subpoena directed to a labor union, demanding union documents. The union official in possession of the documents declined to produce them, claiming that they might tend to incriminate him. The district court rejected his claim, and after he refused to produce the union documents he was convicted of contempt. The Supreme Court sustained the conviction, holding that, although the union, unlike a corporation, did not have a legal existence beyond that of its members, it was such a large and extensive organization that it, in fact, had an existence of its own. 5/ Thus, its officials, like the officers of a corporation, could not validly claim their personal self-incrimination privilege as to the organization's documents. The Court in White stressed that the privilege is not available to corporations and not applicable to corporate documents:

> "Nor do we question the obvious fact business corporations, by virtue of their creation by the state and because of the nature and purpose of their activities, differ in many significant respects from unions, religious bodies, trade associations, social clubs and other types of organizations, and accordingly owe different obligations to the federal and state governments. (322 U.S. at 697-8); . . . Since the privilege against self-incrimination is a purely personal one, it

5/ "Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity." (322 U. S. at 701.)

> cannot be utilized by or on behalf of any organization, such as a corporation. Hale v. Henkel, 201 U.S. 43; Wilson v. United States, 221 U.S. 361; Essgee Co. v. United States, 262 U.S. 151. See also United States v. Invader Oil Corp., 5 F. 2d 715. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. Boyd v. United States, 116 U.S. 616. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. Wilson v. United States, supra; Dreier v. Unites States, 221 U.S. 394; Baltimore & Ohio R. Co. v. Interstate Commerce Commission, 221 U.S. 612; Wheeler v. United States, 226 U.S. 478; Grant v. United States, 227 U.S. 74; Essgee Co. v. United States, supra. . . . They therefore embody no element of personal privacy and carry with them no claim of personal privilege. (322 U.S. at 699-700) (Emphasis added.)

Thus, the "White test", so often cited by appellants as the proper standard with which to measure their appeal, is squarely against them. White held that when an organization without a state-chartered legal existence is so institutional in nature that its interests can be said to be independent of the individual interests of its members, then those members cannot claim their personal privilege against self-incrimination to resist production of documents belonging to the organization. A corporation, since it is chartered as a body with independent

legal existence, always lies outside of the privilege. The validity of this rule has never been questioned by the Supreme Court and is controlling here.

Appellants gain no help from the statutes which grant immunity from prosecution to corporate officers and directors required to testify as individuals before a grand jury investigating possible violations of the antitrust laws. 15 U.S.C. §§32-33. In Heike v. United States, 227 U.S. 131, it was held that the statutes are coextensive with the Constitutional privilege against self-incrimination. Thus, immunity attaches only when a corporate officer or director is required to disclose information or documents as to which he might otherwise make a valid claim of the Fifth Amendment privilege. See Kronick v. United States, 343 F. 2d 436(C.A. 9). Since paragraph 2 of the district court's order excludes from the scope of the subpoena all purely personal documents of the individual appellants, their Fifth Amendment rights have been fully protected. United States v. White, supra; Wilson v. United States, supra; Rogers v. United States, 340 U. S. 367. Appellants are thus without statutory immunity and their arguments based upon claims of immunity are invalid.

Appellants assert that the district court erred in striking the third paragraph of its original order. That paragraph barred the grand jury from utilizing the corporate documents produced in compliance with the subpoena to investigate any

of the individual appellants. The practical effect of such a provision would be to shut the grand jury's eyes to relevant, unprivileged evidence of possible wrong-doing by Maricopa's officers and stockholders. As noted above, the privilege against self-incrimination is personal to individuals. It cannot be claimed to prevent another from testifying. Thus an accused person may stand silent, but he cannot require other witnesses with knowledge of his wrong-doing to do so. Were it otherwise, the privilege against self-incrimination would become a privilege against any incrimination. Here, the evidence of the other witnesses is contained in corporate documents subpoaened from Maricopa. Appellants can no more supress this under their privilege against self-incrimination than they could bar live testimony by other persons before the grand jury or before a court.

In most instances the government learns of individual antitrust violations as the result of inspection of corporate documents. If the information obtained from these documents cannot be used to prosecute officers and directors of the corporation, those officers have in essence been granted an immunity far in excess of that required by the statute, 15 U.S.C. §§32-33, supra. This result is contrary not only to the purposes of the antitrust laws but improperly restricts the discretion of the grand jury to investigate possible criminal activities. As stated by the Supreme Court in United States v.

Thompson, 251 U.S. 407, 413:

> [T]he power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court.

Therefore, the district court properly excised ¶ .3 of its original order.

Appellants ask this court to overrule a line of Supreme Court cases which has been unquestioned by that Court for 60 years by finding that a corporation can claim the Fifth Amendment privilege against self-incrimination and that officers and shareholders of a corporation can claim the privilege as to the corporations documents. This Court properly refused to so rule in Wild v. Brewer, supra, and should not do so in this case.

CONCLUSION

This appeal should be dismissed; if not, the decision of the district court should be affirmed.

Respectfully submitted.

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JULY 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Thomas R. Asher

Washington,

District of Columbia

Thomas R. Asher, being duly sworn deposes and says:

1. I am an attorney with the Department of Justice, Antitrust Division, Appellate Section, in Washington, D.C., and am counsel for the United States in this case.

2. On July ,, 1967, I caused to be served, by United States Air Mail, the foregoing brief of the United States upon:

Lewis, Roca, Scoville, Beauchamp
& Linton
Attorneys at Law
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Attorneys for Appellants.

Thomas R. Asher
Attorney for Appellee

Sworn to before me

this _____ day of July, 1967.

Notary Public